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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 391

A. F. WAGNER IRON WORKS AND WAGNER ENGINEERING CO., PETITIONERS

v.

WAR ASSETS ADMINISTRATION, ET AL., ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Neither the District Court for the Northern District of Illinois nor the Court of Appeals for the Seventh Circuit filed a written opinion. The District Court's finding of fact, conclusion of law, and order vacating the temporary restraining order and denying petitioners' motion for a preliminary injunction appear in the Record at

pages 17-18. The order of the Court of Appeals denying petitioners' motion in that court for a preliminary injunction, affirming the judgment of the District Court, and remanding the cause with directions to dismiss the bill of complaint, appears in the Record at pages 27-28.

JURISDICTION

The order of affirmance of the Court of Appeals was entered on August 5, 1948 (R. 27). The petition for a writ of certiorari was filed on November 1, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether by reason of the fact that it succeeded to the functions relative to surplus property of the War Assets Corporation, a suable Government corporation, the War Assets Administration, a non-corporate and nonsuable branch of the Executive Department, is subject to suit for specific performance of a contract for the sale of a quantity of steel which was surplus property of the United States.[1]

EXECUTIVE ORDER INVOLVED

The pertinent provisions of Executive Order No. 9689, 11 F. R. 1265, 3 C. F. R., 1946 Supp.,

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[1] This is the sole question raised by the petition (Pet. p. 5). No question is raised by petitioners in respect of any denial of independent relief against the two individually named respondents, Klein and Going.

pp. 93-94, establishing the War Assets Administration and transferring to it the functions of the War Assets Corporation relative to surplus property, are set forth in the Appendix, *infra*, pp. 14-16.

STATEMENT

This is a suit against the War Assets Administration and two of its officers, Otto Klein and R. F. Going, for an injunction and for specific performance of an alleged contract for the sale of steel plates which were surplus property of the United States (R. 1-8B). This case was heard before the District Court on petitioners' application for a temporary injunction, which was denied. The facts alleged in the complaint are substantially as follows:

Petitioners are both Wisconsin corporations and allege that the War Assets Administration is an agency of the United States Government amenable to suit. The contract on which petitioners rely was for the sale of 5,000 tons of annealed steel plates located at the War Assets Administration Warehouse No. 12 in Milwaukee, Wisconsin, at a price of $35.00 per ton (R. 3). The date of the contract is not set out, although there is an allegation that, pursuant to the contract, petitioners executed and delivered purchase orders for the steel on June 8, 1946, copies thereof being annexed to the complaint as Exhibits A and B (R. 3, 8A, 8B). This contract was repudiated on August 6, 1946, by respondent R. F.

Going, Deputy Regional Director for General Disposal of the Chicago Regional Office of War Assets Administration, who refused to deliver the steel to petitioners (R. 3-4). At the same time the then Chicago Regional Director, Fred A. McLaughlan, predecessor in office of respondent Otto Klein, agreed to deliver an equal amount of other steel substantially similar in quality, and thereafter representatives of the petitioners and of the Chicago Office selected approximately 1,500 tons of such substitute steel (R. 4-5). Before delivery was made, Regional Director McLaughlan was replaced by respondent Otto Klein, who demanded the payment of $7 per ton more than the contract price of $35 per ton, for the substitute steel, to which demand petitioners were compelled to accede by reason of their commitments and their inability to obtain such steel elsewhere (R. 5). After the 1,500 tons of steel were delivered, petitioners were notified by the Chicago Office of the War Assets Administration that no further deliveries would be made (R. 5).

Petitioners alleged that under the quota system set up by steel manufacturers because of the steel shortage, they have been unable to obtain steel to use in operating manufacturing facilities acquired by them after the quota system went into effect, and that they are thus dependent upon the fulfillment of their contract with the War Assets Administration to obtain sufficient steel to operate

these additional facilities economically and efficiently (R. 5-6). They alleged that there was on hand for disposal at the War Assets Administration Warehouse No. 9 in Milwaukee more than 1,300 tons of steel satisfactory to them as "substitute steel" under the terms of the agreement of August 6, 1946, that by reason of this agreement the petitioners have a superior claim to this steel, and that they are ready, able and willing to make payment therefor in accordance with that agreement (R. 6). It was further alleged that all funds received by the Administration are deposited forthwith to the credit of the United States so that the Administration has no funds subject to its own control and disbursement, that the damages sustained by petitioners "are difficult to reasonably and definitely determine," and that petitioner will sustain irreparable damage unless the sale of the steel on hand in Warehouse No. 9 is enjoined and a judgment for specific performance issued directing the sale and delivery to them of such steel in accordance with the agreements made (R. 7).

Petitioners prayed the issuance of a temporary order restraining the disposition of the steel in Warehouse No. 9, a preliminary injunction enjoining the disposal of this steel to any person or corporation other than petitioners pending the determination of this action, for a permanent injunction, and for a judgment for specific per-

formance directing respondents to sell and deliver to petitioners the steel on hand in Warehouse No. 9, together with approximately 3,500 tons of other similar "substitute steel" which was in the Chicago region and subject to disposal by the Administration (R. 7-8).

A temporary restraining order was issued by the United States District Court for the Northern District of Illinois on May 18, 1948, upon the filing of the complaint (R. 10-12). On May 24, 1948, the District Court entered an order, which was stayed for 24 hours, denying petitioners' motion for a "preliminary" injunction and vacating the temporary restraining order previously entered (R. 17). A similar order, omitting the provision for a stay, was entered by the District Court on the following day, accompanied by a finding of fact that "Defendant, War Assets Administration is an agency of the United States" and a conclusion of law that "Defendants are not sueable [sic] in the District Court of the United States, and this court does not have jurisdiction of this cause" (R. 17-18). Notice of appeal was filed the same day, and by agreement of the parties the restraining order was extended in effect to June 1, 1948 (R. 18). On May 27, 1948, petitioners filed a motion for a temporary injunction in the United States Court of Appeals for the Seventh Circuit (R. 24-26). At the argument of this motion it was agreed by counsel that the

submission of the cause on the motion for an injunction should constitute a submission on the appeal, and the Court of Appeals, after denying the motion for a temporary injunction on May 28, 1948, entered an order on August 5, 1948, affirming the judgment of the District Court and remanding the cause with directions to dismiss the bill of complaint (R. 26-28).

ARGUMENT

Because the War Assets Administration succeeded to the functions relative to surplus property of the War Assets Corporation, a Government corporation which by the terms of its charter could sue and be sued,[2] petitioners contend that the War Assets Administration is also subject to suit (Pet. 3-5, 13). Otherwise stated, it is petitioners' contention that the transfer of a particular governmental function from a suable agency to a nonsuable agency indicates a Congressional intention

[2] The War Assets Corporation (originally the Petroleum Reserves Corporation) was a corporation chartered by the Reconstruction Finance Corporation, with the power to sue and be sued expressly granted to it. 8 F. R. 9044; 10 F. R. 14059. By regulation of the Surplus Property Administration the War Assets Corporation became the disposal agency for all types of property for which R. F. C. had been the disposal agency, which included capital and producers' goods. 10 F. R. 14064; 11 F. R. 408. The establishment of the War Assets Administration in the Office of Emergency Management in the Executive Office of the President and the transfer to it of the functions of the War Assets Corporation relative to surplus property was effected by Executive Order No. 9689, dated January 31, 1946, 11 F. R. 1265, 3 C. F. R., 1946 Supp., pp. 93-94, as amended by Executive Order No. 9707, dated March 23, 1946, 11 F. R. 3149, 3 C. F. R., 1946 Supp., pp. 114-115. See Appendix, infra, pp. 14-16.

to waive the latter's sovereign immunity from suit as to that function.[3] Not only does this contention find no support in *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, upon which petitioners principally rely, but it has also been specifically rejected by this Court on similar facts in *United States* v. *Shaw*, 309 U. S. 495, 505.

This Court's decision in *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, is clearly distinguishable from the case at bar. There the question was whether a Regional Agricultural Credit Corporation, chartered by R.F.C., pursuant to Congressional authority, was immune from suit as an instrumentality of the Federal Government, where neither the statute nor the charter contained any express provision as to suability. After pointing out that in establishing at least forty other corporations to discharge governmental functions, Congress uniformly had included the authority to sue and be sued, the Court held that Congress did not intend to create an exception to this general policy, but "* * * naturally assumed that the general corporate powers to which it had given particularity in the original statute establishing Reconstruction would flow auto-

[3] The alleged contract was not executed until after the transfer to the War Assets Administration of the functions relative to surplus property, so that this petition does not present the question as to whether the War Assets Administration is subject to suit on a contract entered into by the War Assets Corporation.

matically to the Regionals from the source of their being." 306 U. S. at 393.

Unlike the Regional Agricultural Credit Corporation, War Assets Administration is an unincorporated agency of the Government and bears none of the features of a government corporation with a legal entity separate from that of the United States. Cf. *United States* v. *Remund,* 330 U. S. 539, 541. The Congressional policy to make government corporations subject to suit is, therefore, irrelevant as to the War Assets Administration, which is an integral part of the governmental mechanism. While it is true that the rule of strict construction of a waiver of sovereign immunity is not applied by this Court in actions involving government corporations,[4] that rule has not been relaxed in actions against the Government itself. *United States* v. *Sherwood,* 312 U. S. 584, 586, 590; *United States* v. *Shaw,* 309 U. S. 495, 501-502. There being, moreover, no limitation on the power to withdraw the privilege of suing the United States or its instrumentalities (*Lynch* v. *United States,* 292 U. S. 571, 581-582; see *Maricopa County* v. *Valley Bank,* 318 U. S. 357, 362), we submit that the decisions of this Court on which petitioners rely do not justify the inference of a waiver of sovereign immunity merely because the Govern-

[4] As in *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381; *Federal Housing Administration* v. *Burr,* 309 U. S. 242; and *Reconstruction Finance Corp.* v. *Menihan Corp.,* 312 U. S. 81, upon which petitioners rely (Pet. 12, 14).

ment transfers to one of its constituent units a function which was for a time performed by a suable government corporation.

In *United States* v. *Shaw,* 309 U. S. 495, the United States, which had taken over the assets of the United States Shipping Board Emergency Fleet Corporation (a Government corporation with the power to sue and be sued), obtained a judgment against a contractor with the Corporation, and after the contractor's death filed a claim on the judgment in the state probate court having charge of his estate. The administrator was permitted to set off a claim of the estate against the Government and, since it was for an amount in excess of the Government's claim, a judgment thereafter was entered for the balance due the estate, over the Government's objection that by filing a claim it had not subjected itself to a binding, though not immediately enforceable, determination of its liability on a cross-claim. In this Court one of the arguments advanced by the administrator in support of the judgment was that the United States had waived its sovereign immunity when it took possession of the assets of its agent, the Fleet Corporation, prior to the institution of the action and later, while the action was pending, by statute had assumed the Corporation's obligations. In reversing the judgment this Court summarily rejected this contention, saying that it could " * * * see nothing in these transactions

which indicates an intention to waive the immunity of the United States in the state courts." *United States* v. *Shaw*, 309 U. S. 495, at 505. We submit that this conclusion is equally applicable to the Government's immunity in the federal courts and is, therefore, dispositive of petitioners' contention that the transfer of functions from the War Assets Corporation to the War Assets Administration was a waiver of the Government's immunity from suit.

Apparently in recognition of the unsoundness of their argument that there has been a waiver here of the Government's immunity from suit, petitioners quite frankly present this case as a challenge to the Court to repudiate the doctrine of sovereign immunity [5] (Pet. 13, 16-17). However, petitioners cannot complain that the application of the doctrine here leaves them without a remedy, as they can bring an action for breach of their alleged contract either in the District Court under 28 U. S. C. 1346(2) or in the Court of Claims under 28 U. S. C. 1491(4). Even against a private person such an action for money damages is the only remedy ordinarily available, since the equitable

[5] As to petitioners' argument that "The suit cannot unduly interfere with the operations of the Government" (Pet. 13), cf. *Jess Larson, as War Assets Administrator and Surplus Property Administrator* v. *Domestic and Foreign Commerce Corporation*, No. 31, this Term, in which for more than a year and a half the War Assets Administration has been prevented by injunction from disposing of 10,000 tons of coal, pending the final determination of what is, in effect, an action for specific performance for sale of the coal.

remedy of specific performance can be had only in unusual circumstances. The fact that petitioners are asking the Court to require the delivery of specified lots of steel "* * * together with approximately 3500 tons of other similar steel or so-called 'substitute steel' * * * which is in said Chicago region and subject to disposal by [the War Assets] Administration * * *" (R. 8), without any further description or identification of this "other similar steel," demonstrates that the terms of the alleged contract are so uncertain as to much of the subject matter that an attempt to enforce specific performance would be impractical. Cf. *Gulbenkian* v. *Gulbenkian*, 147 F. 2d 173, 175 (C. A. 2); *Cincinnati Underwriters A. Co.* v. *Thomas J. Emery Memorial*, 88 F. 2d 506, 508 (C. A. 6), certiorari denied, 302 U. S. 696. We submit, therefore, that even if this Court could repudiate the doctrine of sovereign immunity, there is no element of hardship in the case at bar which would justify uprooting a doctrine so deeply imbedded in our law.

CONCLUSION

The judgment of the court below is clearly correct, and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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DECEMBER, 1948.

APPENDIX

Executive Order No. 9689, dated January 31, 1946, 11 F. R. 1265, 3 C. F. R., 1946 Supp., pp. 93-94, provides in pertinent part:

CONSOLIDATION OF SURPLUS PROPERTY FUNCTIONS

Whereas the Surplus Property Administration has now substantially completed the performance of its policy-making functions, the War Assets Corporation is now vested with the major part of domestic surplus property disposal, and the State Department is now vested with the major part of foreign surplus property disposal; and

Whereas, after a reasonable period in which to make necessary administrative arrangements, it will be feasible and desirable to establish a War Assets Administration as a separate agency directly responsible to the President to exercise consolidated functions relating to the disposal of domestic surplus property;

Now therefore, by virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941 (55 Stat. 838), and as President of the United States, it is hereby ordered as follows:

1. The functions of the Surplus Property Administrator and of the Surplus Property Administration are hereby transferred, ex-

cept as otherwise provided herein, to the chairman of the board of directors of the War Assets Corporation, and to the War Assets Corporation, respectively, and the Surplus Property Administration shall be deemed merged into and consolidated with the War Assets Corporation.

2. All functions of the Surplus Property Administrator and the Surplus Property Administration which relate to surplus property located outside the continental United States, Hawaii, Alaska (including the Aleutian Islands), Puerto Rico, and the Virgin Islands are transferred to the Secretary of State and the Department of State, respectively.

3. Effective March 25, 1946 (a) there shall be established, in the Office for Emergency Management of the Executive Office of the President, a War Assets Administration at the head of which there shall be a War Assets Administrator, who shall be appointed by the President by and with the advice and consent of the Senate, and who shall receive a salary at the rate of $12,000 per annum unless the Congress shall otherwise provide, and (b) the functions of the War Assets Corporation relative to surplus property and of the chairman of the board of directors of the War Assets Corporation relative to surplus property shall be transferred to the War Assets Administrator.

4. There shall be transferred to the agencies to which functions are transferred by this order so much as the Director of the Bureau of the Budget shall determine to relate primarily to such functions, respectively, of the records, administrative property, personnel, and funds of the Surplus Property Administration, the Office of War Mobilization and Reconversion, the Reconstruction Finance Corporation, and the War Assets Corporation. All authorizations, commitments, or other obligations incurred as a disposal agency by the Reconstruction Finance Corporation or by the War Assets Corporation under the Surplus Property Act of 1944 shall be transferred to the War Assets Administration upon its establishment.

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